

ARKANSAS SUPREME COURT

No. CR 06-171

NOT DESIGNATED FOR PUBLICATION

Opinion Delivered September 28, 2006

JESUS M. BARRAGAN
Appellant

PRO SE APPEAL FROM THE CIRCUIT
COURT OF BENTON COUNTY, CR
2005-163, HON. DAVID S. CLINGER,
JUDGE

v.

STATE OF ARKANSAS
Appellee

AFFIRMED

PER CURIAM

Jesus M. Barragan entered a plea of guilty to being an accomplice to the delivery of a controlled substance (methamphetamine) and received a sentence of 180 months' imprisonment with suspended imposition of sixty months of the sentence and a fine. Subsequently, appellant timely filed in the trial court a *pro se* petition for postconviction relief pursuant to Ark. R. Crim. P. 37.1. The trial court denied the Rule 37.1 petition without a hearing, and appellant, proceeding *pro se*, has lodged an appeal here from that order.

We do not reverse a denial of postconviction relief unless the trial court's findings are clearly erroneous. *Greene v. State*, 356 Ark. 59, 146 S.W.3d 871 (2004). A finding is clearly erroneous when, although there was evidence to support it, the appellate court after reviewing the entire evidence is left with the definite and firm conviction that a mistake has been committed. *Flores v. State*, 350 Ark. 198, 85 S.W.3d 896 (2002). In its order, the trial court found that appellant intelligently and voluntarily entered a plea of guilty "with the competent advice of counsel." Further, the trial court found that appellant failed to allege specific errors in support of his petition, setting

forth only conclusory statements.

On appeal, after setting forth the reasons he was not an accomplice to the crime, appellant argues several points for reversal, each of which concern his guilty plea: (1) ineffective assistance of trial counsel resulted in appellant's entering a coerced, involuntary plea of guilty; (2) the trial court failed to determine that appellant's plea was voluntary; (3) the trial court's denial of appellant's petition constituted a cover-up of the court's improper acceptance of his guilty plea and sentencing. Appellant did not raise the last two claims in his original Rule 37.1 petition, and the trial court's order does not address these points. It is well-settled that we will not consider an argument raised for the first time on appeal. *Ayers v. State*, 334 Ark. 258, 975 S.W.2d 88 (1998).

As to appellant's initial contention of ineffective assistance of counsel, appellant must show that counsels' representation fell below an objective standard of reasonableness and that but for counsels' errors, the result of the trial would have been different. *Strickland v. Washington*, 466 U.S. 668 (1984); *Andrews v. State*, 344 Ark. 606, 42 S.W.3d 484 (2001) (*per curiam*). Where a case involves an allegation of ineffectiveness in relation to a guilty plea, the appropriate standard of prejudice is whether, but for counsel's errors, there is a reasonable probability that the defendant would not have entered a guilty plea and thereby waived his right to a trial. *Jones v. State*, 355 Ark. 316, 136 S.W.3d 774 (2003).

Although appellant's argument centered around being coerced into entering an involuntary plea of guilty, the transcript of appellant's guilty plea hearing was not brought up on appeal. The record does not indicate that appellant filed a writ of *certiorari* to supplement the record on appeal to include the transcript of this hearing. The party asserting error has the burden to produce a record sufficient to demonstrate prejudicial error, and this court does not consider evidence not included

in the record on appeal. *Smith v. State*, 343 Ark. 552, 39 S.W.3d 739 (2001). Thus, appellant failed to bring up a record on appeal sufficient to support this claim.

Moreover, appellant's argument on this point in both his original petition and brief to this court contains only conclusory allegations of ineffective assistance of counsel. The burden is on appellant to provide facts to support his claims of prejudice. *Nelson v. State*, 344 Ark. 407, 39 S.W.3d 791 (2001) (*per curiam*). Allegations without factual substantiation are insufficient to overcome the presumption that counsel was effective. *Id.* Conclusory statements cannot be the basis of postconviction relief. *Jackson v. State*, 352 Ark. 359, 105 S.W.3d 352 (2003). Appellant failed to provide facts sufficient to support this claim.

As appellant failed to show that he was coerced into entering his guilty plea, we cannot say that the findings of the trial court were clearly erroneous.

Affirmed.